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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TINO PAUL ARCHULETA, Defendant and Appellant.	B151910 (Super. Ct. No. VA059556)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry S. Knupp, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Paul M. Roadarmel Jr., Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, Tino Paul Archuleta, appeals from the judgment entered following his conviction, by jury trial, for first degree murder (Pen. Code, § 187).[1] Sentenced to a state prison term of 25 years to life, he contends there was trial error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On November 27, 1999, Sylvia Shu applied for work as an out-call stripper for Metro Entertainment. Metro arranged bookings for the strippers; customers paid $150 to $300 per booking, of which Metro received 60 percent. Strippers were taken to the bookings by drivers who stayed around to make sure the strippers weren't harmed. The drivers were usually paid 10 percent of the stripper's portion of the booking fee, plus 20 percent of any tips. When Shu applied to work at Metro, she was accompanied by defendant Archuleta, whom she introduced as her driver. They sat close together while filling out job applications and gave the impression they were romantically involved.

Gersom Lopez testified he had worked as a driver for Shu, who introduced him to Archuleta in November. On the night of December 3, 1999, Shu called Lopez to come pick her up because her car had broken down. When Lopez arrived, Archuleta was with

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[1] All further statutory references are to the Penal Code unless otherwise specified.

her. Lopez drove them to two jobs. Before they left, Shu took two muscle relaxants. While Lopez and Archuleta were waiting outside the customers' apartment at the first job, Lopez mentioned he had had sex with Shu. Archuleta said he had never had sex with her. One of the customers invited them into the apartment. There were two other men in the living room and Lopez could hear Shu having sex with a fourth man in the bedroom. When Shu came out of the bedroom, she was naked except for a belt and she seemed to be intoxicated. Shu asked who was next and took another customer into the bedroom. One of the customers told Lopez they had each paid $200 to have sex with Shu.

After leaving this first job, Shu gave Lopez between $60 and $80. When Lopez protested this was too little, given that Shu had already made about $1,000, she noted Archuleta had not complained about receiving only $20. Archuleta was very quiet during this time. Lopez drove them to the second job. Shu and Archuleta returned after an hour and a half, and Shu gave Lopez $25 or $30. Lopez then drove them to Shu's apartment at about 3:30 or 4:30 a.m. On the way, Shu was still intoxicated and she slept on the back seat. Archuleta had to help Shu walk to her apartment. Lopez left.

On December 30, 1999, the manager of Shu's apartment building became concerned about uncollected mail that had been accumulating since early December. The police were called and they found Shu's body inside her apartment, in a state of advanced decomposition. The kitchen faucet was running, the heater and the fireplace were on, and the apartment appeared to have been ransacked. There was no money in the apartment. Shu's body was lying face down between the box spring and the mattress of her bed. The

medical examiner testified she had been dead for more than seven days, and that she had apparently died from neck compression of some kind. There was a 1999 calendar with the days crossed out as they passed; the last day crossed out was December 2.

Police detectives met with Archuleta on January 12, 2000. Archuleta said he had worked as Shu's driver, but that he hadn't seen her in about a month. At one of the last jobs he had driven her to, Shu had had sex with four or five men and Archuleta got disgusted with her. He said she had made about $1,000 the last night he worked with her. He denied having ever been in her apartment.

On May 10, 2000, a very distraught Archuleta came to the police station after he called the detectives and said he wanted to talk. He admitted killing Shu. He said he had gone into her apartment the last night they worked together and asked if he could sleep in her living room. He later went into her bedroom, wrapped a nylon rope around her neck and strangled her. He denied having robbed her. He said he had been forced to kill her by some white man with blond hair who worked for Michael Williams, the man who ran Metro Entertainment. Shu had been stealing money from Williams. One of her scams was to tell Metro that a job had been cancelled, although she had actually done the job and been paid. Archuleta was told he should kill Shu that night and he was given the nylon rope to use. Archuleta said he didn't get paid for killing her; he had done it to avoid being killed himself.

Joesph Calavitta was a childhood friend of Archuleta's. In the fall of 1999, they were sharing a house with several other men; all of them were on the Cal State Fullerton

wrestling team. Carissa Pargee, Archuleta's former girlfriend, lived at the house for a period of time. She did not share a bedroom with Archuleta, and Calavitta did not think Pargee and Archuleta were still in a relationship by that time. Calavitta knew Archuleta worked as a driver for a stripper. On one occasion, Calavitta saw a blond girl sleeping on the couch; this might have been the stripper Archuleta drove for. Calavitta was in Las Vegas at a wrestling tournament from December 2 through December 5, 1999. When he got back, Archuleta had new clothes and he paid over $500 in past-due rent. Archuleta said he had made $1,000 the last night he worked as a driver.

2. *Defense evidence.*

A woman who lived directly above Shu testified she heard loud music coming from Shu's apartment between December 16 and December 20, 1999. This neighbor had seen Shu with Bobby Williams (Michael Williams's nephew) in the parking lot four times, and she had once seen them arguing. She had also seen Shu with Michael Williams once. Another neighbor testified that on December 17, he saw Bobby Williams and a woman leave Shu's apartment carrying a plastic grocery bag which Bobby put in the trash.

An employee at Hurley International testified Archuleta came to the factory warehouse in December and received free clothing as the employee's guest.

Archuleta's mother testified she gave him $800 at the end of November 1999. That same month, Archuleta started crying one day while they were in the car. When she

asked what the matter was, he said he had gotten "mixed up in the wrong crowd" and that he was "scared for [his] life."

Telephone records showed that Michael Williams called Archuleta 28 times in November 1999 and two times in December 1999.

CONTENTIONS

1. The trial court erred by refusing to instruct on the defense of duress.

2. The trial court erred by refusing to instruct on either voluntary manslaughter or on the provocation that would reduce first degree murder to second degree.

3. The trial court erred by failing to instruct on implied malice murder.

4. The trial court erred by admitting evidence about Archuleta's drug use.

DISCUSSION

1. *Duress defense*.

Archuleta contends the trial court erred by refusing to instruct the jury on the defense of duress. This claim is meritless.

Archuleta asserts "the only reason the [trial] court did not allow application of the [duress defense] was because this was a murder case. However, appellant was not facing the death penalty and the jury should have been allowed to consider duress on the murder charge." Although it is true our Supreme Court is currently considering the extent to which duress can be a defense to homicide,[2] it is not true the trial court refused to instruct

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[2] See *People v. Reay*, S093980 (review granted March 14, 2001); *People v. Anderson*, S094710 (review granted March 28, 2001).

on duress because this was a murder case. What the trial court said was: "[T]here is no evidence of immediate or serious danger to the defendant's life in this matter. The Court finds it is a matter of law [that] duress, threats and menaces, are not an available defense in the matter; and, therefore, the Court declines to give [a duress instruction]." The trial court was right.

"A trial court need only give those requested instructions supported by evidence that is substantial. [Citation.] Central to a defense of duress is the immediacy of the threat or menace on which the defense is premised. [Citations.] '[A] phantasmagoria of future harm,' such as a death threat to be carried out at some undefined time, will not diminish criminal culpability. [Citations.] [¶] Here, defendant's vague and unsubstantiated assertion in his statement to Officer Reyes – that the Colombian Mafia had threatened to kill him and members of his family if he did not kill the Guerrero brothers – did not constitute substantial evidence that the threat of death to defendant and his family was *imminent*. Without bestowing merit on defendant's theory that duress can negate premeditation and deliberation, we simply hold that *in the absence of substantial evidence of immediacy of the threatened harm, the trial court did not err in refusing defendant's proffered instructions*." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 125, italics added; see also *People v. Manson* (1976) 61 Cal.App.3d 102, 206 ["Compulsion as a legal defense requires evidence that the accused acted upon reasonable cause and belief that her life was presently and immediately endangered if she refused to participate.

[Citations.] Here there is no evidence that Manson's instructions were accompanied by any threat. Simply following orders is not a defense under the facts of this case."].)

Archuleta argues a duress instruction was warranted based on his statements to police that he killed Shu "because he was forced to do so by a guy who worked for Mike Williams" and that "he was afraid of being killed himself," and based on his statement to Carissa Pargee that "he was forced to do the killing by people with guns." But the record shows these "vague and unsubstantiated assertion[s]" were precisely the sort that fall short of requiring a duress instruction. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 125.) Archuleta told police Shu had gotten herself into trouble stealing some money and, as a result, he "was given an ultimatum" to kill her. "So it was either – I did it or I got killed. That's why I had to do it." "I did a lot of cocaine that night you know, 'cause . . . we had stopped back at the office, you know and I went up to drop the money off like I always do. And then that's when . . . they told me, okay, you're gonna have to do it tonight." "He said, don't shoot her you know. He said . . . just do it any other way. I mean, you know it's like, well, how? So they gave me a rope and they said here." Asked who "they" were, Archuleta said it was Michael Williams "who ultimately . . . made the decision to do it."

Asked specifically who had told him to kill Shu, the following colloquy occurred:

"A. I don't – I don't know specifically who the guy was. I'd only met 'em like once or twice before that.

"Q. Did – who did he work for?

"A. Uh, from Mike I believe.

"Q. Oh, he worked for Mike.

"A. I believe so.

"Q. Well, why did he wanna kill – have her killed?

"A. Because . . . she was steeling [*sic*] money from 'em. Like I –

"Q. I see.

"A. – like I told you. How many pimps let their ho's steel money from 'em?"

"Sgt. Holmes: But what did you get in return for doing it?

"A. Living. Me not getting killed.

"Q. Why would they wanna kill you?

"A. Because they believed that I was involved in it.

"Q. Oh, I see.

"A. That me and her were working out . . . something to steel money from them. You know, which was total bullshit . . . because at the same time, all the money that she made Mike, he was blowing it on me by buying drugs off of me. So really it was like – it was kinda bullshit."

"Q. Now, . . . at any point in time, did Mike tell you to do this? To kill her?

"A. Not specifically from him, no.

"Q. At any point in time, did Bobby tell you to do it?

"A. No.

"Q. At any point in time, did anybody tell you to do it?

"A. Yeah.

"Q. Okay, now that person what is his name?

"A. I don't know.

"Q. But he – who does he work for?

"A. For Mike.

"Q. Okay, can you describe him?

"A. No, because –

"Q. I mean, what race is he?

"A. White.

"Q. White guy?

"A. Uh-hum.

"Q. How old?

"A. Like I would say about Mike's age.

"Q. Mike's age –

"A. But I don't – I don't –

"Q. Older than you guys?

"A. Yeah."

Archuleta tries to bolster this meager evidence by citing Pargee's testimony that Archuleta told her "how there were people that had guns and kind of just said that he was forced into it because of these people." But this is even more vague than what Archuleta told the detectives. Archuleta cites the telephone records showing that Michael Williams

had called him 28 times in December 1999, and that Archuleta had called him 21 times between the end of October and December 6, 1999. Archuleta tries to put a sinister spin on this evidence and on the evidence that neighbors saw Michael and Bobby Williams at Shu's apartment both before and after her death. But none of this evidence gives rise to any substantial inference that Archuleta killed Shu because he was in imminent fear for this own life. The telephone calls are more easily explained by Archuleta's admission he was supplying Michael Williams with cocaine. Archuleta told the detectives that Michael Williams had not threatened him and that he was not afraid of Michael. There was insufficient evidence to warrant a duress instruction.

2. *Heat of passion instructions.*

Archuleta contends the trial court erred by refusing to instruct the jury on heat of passion as it relates to the lesser included offenses of second degree murder and voluntary manslaughter. This claim is meritless.

A trial court must instruct on a lesser included offense if there was sufficient evidence to support a reasonable jury finding that the lesser offense had been committed rather than the greater. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-163.) The evidence must be of some weight, however; the existence of "any evidence, no matter how weak" will not justify instructions on lesser offenses. (*Id.* at p. 162.) "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an

‘ “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.” ’ . . . [T]he passion aroused need not be anger or rage, but can be any ‘ “ ‘[v]iolent, intense, high-wrought or enthusiastic emotion’ ” ’ [citation] other than revenge [citation].” (*Id.* at p. 163.) “[W]here the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory. The fact that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance.” (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Accordingly, CALJIC No. 8.73 provides: “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.”

Pointing to the evidence showing that he and Shu had something more than a simple work relationship, Archuleta argues there was substantial evidence he “may have acted in a rage in response to Shu’s multiple sexual acts on the night of her death,” and that the jury could have reasonably found “the killing resulted from an argument that led

to a rage that led to an explosion of violence." The trial court refused to so instruct, finding "there is simply no evidence in the record to show that this would be a voluntary manslaughter situation," and "that as a matter of law, . . . this killing did not occur upon a sudden quarrel or heat of passion. There is insufficient evidence in the record for the jury to consider that." The trial court was correct. Although there was some evidence there might have been romantic feelings between Archuleta and Shu, there was *no* evidence Archuleta killed her in a jealous rage, in a paroxysm of fear, or as a result of any other violent emotion.

When the detectives asked Archuleta if the killing had been preceded by an argument, he replied: "No, there was noth – it was nothing like that. It was nothing like that." Indeed, in addition to the significant lapse of time (four or five hours) between the alleged provocation and the killing, Archuleta – by his own admission – made a very deliberate decision to kill Shu. He told the detectives that when he and Shu got back to her apartment that night it was already 5:00 a.m. and she agreed to let him sleep there. Archuleta told the detectives: "So I laid [*sic*] in the living room, she went in her room. About an hour had passed, just – that I laid there just you know, really debating on weather [*sic*] to do it or not you know. Just – you know, no, yes, no, I should just leave, you know like – it's like I couldn't and so I just had went in her room you know. So I crawled around her bed. . . . [and] I sat there for a while [before strangling her]." By his own account, Archuleta not only spent an hour in Shu's living room debating with himself whether to kill her, but he then entered her bedroom and thought about it some

more before finally doing the deed. There was no evidence Archuleta's reason was obscured by passion when the killing occurred.

Archuleta argues "the trial court must have necessarily determined there was sufficient evidence of heat of passion" because it mentioned heat of passion when it was reading CALJIC No. 8.20.[3] Not so. The record clearly shows the trial court determined there was insufficient heat of passion evidence, and the mere fact the court subsequently referred to heat of passion in a way that benefited Archuleta does not mean there was prejudicial error.

3. *Implied malice instruction.*

The trial court gave a superfluous implied malice instruction in the course of defining the general concept of murder. Archuleta contends that, as the trial court did not also give an instruction limiting the concept of implied malice to second degree murder, he was prejudiced because the jury would not have known it was improper to base a first degree murder verdict on an implied malice theory. This claim is meritless.

Archuleta argues the superfluous implied malice instruction inevitably confused the jury and that the trial court should have remedied this by giving CALJIC No. 8.31, which would have defined implied malice second degree murder. But, because Archuleta

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[3] "If you find the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflections *and not under a sudden heat of passion* or other condition precluding the idea of deliberation, it is murder of the first degree." (Italics added.)

failed to object to the superfluous implied malice instruction, he has waived any claim of error. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 ["Defendant claims that [certain language] rendered the instruction vague, misleading and constitutionally defective. However, if defendant believed the instruction was unclear, he had the obligation to request clarifying languages."]

In any event, it is clear the jury would not have been confused. The evidence at trial showed only an intentional killing. Archuleta confessed to killing Shu after having been given an ultimatum to do so. He admitted that he lay in her living room for an hour debating whether to carry out the deed before going into her bedroom and strangling her. The evidence thus clearly showed intent to kill, and a defendant who intends to kill necessarily has express rather than implied malice. Taking the instructions as a whole, the jury would not have believed it could convict Archuleta of first degree murder based on an implied malice theory. Moreover, the jury was given the option of reaching a second degree murder verdict if it found insufficient evidence of premeditation and deliberation. Thus, the first degree murder verdict necessarily encompassed a finding that Archuleta acted with premeditation and deliberation, i.e., that he necessarily acted with intent to kill.

Archuleta's claims also rests on the incorrect premise that because the jury found a deadly weapon use allegation untrue it must have rejected the prosecution's express malice theory that Archuleta strangled Shu with the rope. This premise violates the general rule upholding inconsistent verdicts that is embodied in section 954 (acquittal of

one or more counts shall not be deemed an acquittal of any other count). "It is . . . settled that an inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both." (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.) This is because inconsistent jury findings frequently result from leniency, mercy or confusion, and such inconsistencies do not invalidate the verdicts. (*People v. York* (1992) 11 Cal.App.4th 1506, 1510.)[4]

4. *Other crimes evidence.*

Archuleta contends the trial court erred prejudicially by admitting evidence showing that he used and sold drugs. He argues this evidence had "no legitimate purpose except to show [he] was a bad person." This claim is meritless.

Although there were several references during the trial to Archuleta's use or sale of drugs, he only objected one time. And although there was apparently no direct link between drugs and Shu's killing, this evidence tended to both corroborate and explain certain other evidence.

The first reference to drugs came when the trial court asked Pargee if she knew whether Archuleta had any other job besides driving for Shu, and the following colloquy

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[4] We also reject Archuleta's suggestion the failure to instruct on implied malice second degree murder, when combined with the refusal to instruct on voluntary manslaughter and duress, resulted in cumulative error. As shown above, there was no error in refusing voluntary manslaughter and duress instructions.

occurred: "The Witness: Not real jobs. [¶] The Court: As opposed to fake jobs? [¶] The Witness: I mean like selling drugs and all that, but I wouldn't call that a job." There was no defense objection.

The second reference occurred when the prosecutor asked Calavitta if he had ever seen Archuleta involved with drugs. After the trial court overruled a defense objection on relevancy grounds, Calavitta said he once saw Archuleta with a little marijuana, but that he had never seen Archuleta use drugs. Calavitta was then asked if he hadn't told police he was so upset when he once caught Archuleta using cocaine that he got into a fight with him. Calavitta replied: "No. . . . I didn't get involved because [Archuleta] was using them. I got involved because there was drugs in the house. I didn't want drugs in my house. And I confronted [Archuleta] physically. He didn't confront me. That was it."

The third reference to drugs was in Archuleta's confession, when he said he had been using cocaine the day he killed Shu, that he had been selling cocaine to Michael Williams, and that he had been so guilt-ridden before confessing that he had contemplated committing suicide in connection with methamphetamine.[5]

Thus, it is apparent that Archuleta's use and sale of drugs was not completely irrelevant to the case, and that this evidence did have a legitimate purpose other than to

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[5] Archuleta told detectives: "[T]here was a couple of times when, I just went out to . . . this town where they just cook speed. All they do is they cook speed out there. And then for like two days, I – that's all I would do is just cook speed, hopefully I would just kill myself."

show he was a bad person. The testimony of Pargee and Calavitta tended to corroborate parts of Archuleta's confession, and Archuleta's admission that he had been supplying Michael Williams with cocaine tended to rebut the inference all the phone calls between the two of them might have had something to do with Archuleta's story that he had killed Shu at Williams's behest. In any event, there could not have been any real prejudice flowing from the drug-related revelations because they entirely paled beside Archuleta's admission that he had strangled Shu to death with a rope.

DISPOSITION

The judgment is affirmed.

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KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.